Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1979

No. 79-2084

SAN ANTONIO PORTLAND CEMENT COMPANY,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD
AND
UNITED CEMENT, LIME AND GYPSUM
WORKERS INTERNATIONAL UNION
AFL-CIO
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

San Antonio Portland Cement Company (Company) prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered on March 10, 1980, enforcing an order of the National Labor Relations Board against the Company.

OPINIONS BELOW

The opinion of the Court of Appeals (Appendix A) is reported at 611 F.2d 1148 (1980). The Decision an Order of the National Labor Relations Board (Appendix B) is

reported at 240 N.L.R.B. No. 163 (1979). The Hearing Officer's Report and Recommendations in the underlying representation proceeding is reproduced in Appendix C.

JURISDICTION

The decision of the Court below issued on February 15, 1980. On March 10, 1980, the Court below entered its judgment in this case. (Appendix D). The Company's Petition for Rehearing was denied by Order dated April 8, 1980 (Appendix E). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1976).

QUESTIONS PRESENTED

1. Whether two employees actively engaged in a union organizational campaign were properly found not supervisors as that term is defined in Section 2(11) of the National Labor Relations Act?

2. Whether the court below applied the appropriate standard for deference to Board credibility determinations which were based on inadequate reason or no reason at all?

STATUTE INVOLVED

Section 2(11) of the National Labor Relations Act, as amended (61 Stat. 137, 138, 29 U.S.C. § 152(11)) provides:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

STATEMENT OF THE CASE

In this case a panel of the Court of Appeals enforced a Decision and Order of the National Labor Relations Board which found the Company in violation of Section 8(a)(5) and (1) of the Act by refusing to bargain with the United Cement, Lime & Gypsum Workers International Union (the Union). In so ruling the Court adopted crucial findings of the Board concerning the lack of supervisory status of two Company employees, Gregory Fuentes and Joe Fernandez. These findings, which are unsupported by substantial evidence and erroneous as a matter of law, form the basis for the instant petition.

A. COURSE OF PROCEEDINGS AND DISPOSITION BELOW

Pursuant to a stipulation executed by the parties, an election was held on March 17, 1978, in a unit of production and maintenance employees of the Company. On March 24, 1978, following the election, the Company filed timely Objections to Election. Upon investigation, the Regional Director of the Twenty-Third Region of the National Labor Relations Board determined that a hearing was necessary to resolve certain material questions concerning conduct affecting the election. In particular, the Hearing Examiner was directed to consider the Company's objection that employees Fuentes and Fernandez were both supervisors and that both had coerced and intimidated employees on behalf of the Union prior to the election.

The hearing was held, and on July 13, 1978, the Hearing Officer issued his report. His proposed findings on this issue were that neither Fuentes nor Fernandez were supervisors under the Act, and therefore their activities on behalf of the Union did not unlawfully affect the results of the election. In the course of these proposed findings the Hearing Officer obviously ignored testimony which would

tend to require nullification of the election and made credibility choices for inadequate reason or no reason at all. (See Appendix C, *infra*).

On September 8, 1978, the Board adopted without comment or explanation the Hearing Officer's findings and recommendations, and certified the Union as the exclusive bargaining representative for the unit employees. Because the Board refuses to provide for direct appeal of its decision in a representation case, the Company was forced to refuse to supply information to or bargain with the Union to test the validity of the underlying certification. Consequently, on October 3, 1978, the Union filed its unfair labor practice charge alleging violation of Sections 8(a)(5) and (1), and a complaint was issued on October 13, 1978. The Board on March 5, 1979 issued its decision finding that Petitioner had unlawfully refused to bargain.

The NLRB then filed its application to the United States Court of Appeals for the Fifth Circuit for enforcement of its Order. That court held that there was substantial evidence to support the Board's Order, and therefore entered judgment enforcing the Order on March 10, 1980. The Company timely filed a Petition for Rehearing, which was denied on April 8, 1980. Thereafter, the Company filed a Motion for Stay of Mandate Pending Application for Certiorari, which also was denied by the lower court.

B. STATEMENT OF FACTS

The Company's position is that the election results were tainted by certain activities of Company supervisors campaigning on behalf of the Union, and therefore the election should be invalidated. *NLRB* v. *Lord Baltimore Press, Inc.*, 300 F.2d 671, 673 (4th Cir. 1962). The Court of Appeals, by its findings that Fuentes and Fernandez were not supervisors, was not required to consider the effect of their con-

duct upon the election. Accordingly, this Petition will concentrate primarily upon the issue of supervisory status, and will not dwell upon the coercive and intimidating conduct they engaged in on behalf of the Union.

1. The Supervisory Status of Gregory Fuentes

Gregory Fuentes was employed by the Company as Chief Carpenter and Utilityman during the relevant time period. In charge of the carpentry-utility crew, Fuentes' job consisted of keeping the Company Village, home to many employees, in good repair. His crew consisted of himself and three other men, and it was undisputed that he was the highest paid person in the group. His direct supervisor, in a workforce of some 180 employees, was the Plant Superintendent himself.

Gregory Fuentes recommended pay increases for his men which were routinely granted. For example, in November of 1976, Fuentes requested that a crew member receive a pay raise, a raise which was approved without change.

When the carpentry-utility crew needed additional help, Fuentes would independently and effectively request that specific individuals be assigned to his crew. For example, on several occasions he specifically requested that certain employees be assigned to his crew, and those requests were regularly approved. Fuentes did not dispute these facts during his testimony at the hearing.

Jobs for the carpentry crew were assigned by the Plant Superintendent to Fuentes, who would then, according to his own testimony, direct the members of his crew in the performance of that work. Included in this supervision of the work is the planning of work schedules. Fuentes formulates lists of materials needed, directs his crew and decides, based on his own discretion, which individuals will perform what work. He is also responsible for obtaining

and maintaining the stock of tools that the carpenter-utilitymen use. Fuentes also possessed and exercised the authority to assign particular tasks to members of his crew. In November 1976, for example, Fuentes specifically directed a member of his crew to cease working on one project and begin working on another. This decision to assign a crew member to a different task was made solely by Fuentes on the basis of his own judgment of who was the most qualified person for the job.

Testimony by the Union's own witness, Amado Garcia, clearly establishes that the members of Fuentes' crew, as well as Fuentes himself, recognized and acknowledged Fuentes' supervisory status. Garcia, a member of the crew, testified that on one occasion Fuentes approached the crew waving a piece of paper in his hand. The paper contained statements to the effect that Fuentes was the "Chief" and the other crew members were "Indians," indicating that Fuentes was in charge of the shop. Thus, the members of Fuentes' crew, as well as Fuentes himself, clearly understood that Fuentes was their supervisor.

In light of this testimony, Fuentes' broad self-serving denial of having any supervisory authority simply cannot be credited. Aside from the cogent testimony of Union witness Garcia establishing Fuentes' standing in the employment hierarchy, the undisputed testimony of Personnel Director Galindo requires the conclusion that Fuentes is a supervisor. Nevertheless the Hearing Officer (and the Board) chose to credit Fuentes' testimony over that of Galindo on the grounds that Fuentes was supposedly more familiar with the day-to-day operation of the Village repair crew.

Yet Fuentes' own testimony establishes that Galindo should have been in an excellent position to judge his duties and authority. Fuentes admitted that it was Galindo

who decided whether Fuentes would work in the "Village" or in the plant, that Galindo saw Fuentes very frequently when he worked in the Village, and that Galindo was at the Village 3 or 4 times a week, at least one or twice a day.

In actuality, then, Galindo was intimately familiar with Fuentes' work, since he directly witnessed 90-95% of his performance. Thus the basis of the Hearing Officer's and the Board's failure to credit Galindo's testimony is clearly erroneous.

2. The Supervisory Status of Joe Fernandez

Joe Fernandez has held the supervisory position of Chief Diesel Engine Operator since 1977. Each shift of the Company powerhouse was made up of three persons — an operator and two maintenance men. In addition, Fernandez worked the day shift, directly supervising the operator and maintenance men, acting as an "operators operator," and available to the other shifts as needed. Not only did Ferandez, by his own testimony, receive more money than the other members of his crew, he actually set up the rotating crew schedule for the performance of their work. Fernandez is the only Chief Operator, and no one took his place on the other shifts, in spite of the fact that the powerhouse worked as a 24-hour operation.

Because the powerhouse must operate on a 24-hour basis, Fernandez had the power to call in an operator in case of an emergency, and he had the authority to authorize overtime. At the end of the day shift, Fernandez would leave directions for the second shift which followed. In addition, he scheduled vacations for the members of his crew and prepared requisitions of equipment needed.

In the absence of his supervisors, Fernandez was empowered to shut down engines in the generating plant, a decision which could mean the shutting off of power to the entire

plant. Joe Fernandez also testified that he had the authority to tell an operator to shut down an engine and remembered two such instances since he became Chief Operator. On other occasions he did not have to tell the operator to shut down the engines because they had already done it by the time they reported to him. Fernandez admitted that the other operators reported such things to him because he was the Chief Operator.

As was the case with Fuentes, Fernandez broadly denied having any supervisory authority. This denial can hardly be squared with the convincing testimony of Personnel Manager Galindo recounting his supervisory activities. The Hearing Officer chose to credit Fernandez' testimony over that of Galindo, but gave absolutely no reason for doing so. Both the Board and the Court below mistakenly affirmed the Hearing Officer's decision in this respect.

REASONS FOR GRANTING THE WRIT

A. THIS CASE PRESENTS QUESTIONS OF SUBSTANTIAL AND RECURRING IMPORTANCE IN COLLECTIVE BARGAINING AND THEREFORE IS APPROPRIATE FOR DECISION BY THIS COURT.

The determination of supervisory status is a frequently recurring issue in the context of important representation and collective bargaining matters. The decision rendered by the court below casts doubt on the heretofore well-settled interpretation of Section 2(11) of the Act, which sets out the test for determining supervisory status.

Section 2(11) has long been construed in the disjunctive, so that the possession of any one of the authorities listed places the employee having such authority in the supervisory category. *NLRB* v. *Handy Hardware Wholesale, Inc.*, 542 F.2d 935 (5th Cir. 1976); *Pacific Intermountain Express*

Co. v. *NLRB*, 412 F.2d 1 (10th Cir. 1969); *Ohio Power Co.* v. *NLRB*, 176 F.2d 385 (6th Cir. 1949).

The mere existence of the authority, for example, to transfer, suspend, promote, or discharge employees or effectively to recommend any of the foregoing actions is sufficient to imbue one with supervisory status under the Act even if such authority has never been exercised. It is not the exercise of supervisory power, but its existence, which creates the status. *NLRB* v. *Pilot Freight Carriers, Inc.*, 558 F.2d 205 (4th Cir. 1977), *cert. denied sub nom. Chauffeurs, Teamsters & Helpers Local 391* v. *Pilot Freight Carriers, Inc.*, 434 U.S. 1011 (1978); *NLRB* v. *Metropolitan Petroleum Co. of Mass.*, 506 F.2d 616 (1st Cir. 1974); *NLRB* v. *Brown & Sharp Mfg. Co.*, 169 F.2d 331 (1st. Cir. 1948); *Quality Transport Inc.*, 211 N.L.R.B. 198 (1974), *enforced* 90 L.R.R.M. 2890 (5th Cir. 1975). In the case at bar, however, the two named individuals not only possessed, but exercised, supervisory authority.

It is clear from the record that Gregory Fuentes had the authority to schedule and assign work, transfer employees to and from his crew, requisition materials, and recommend pay increases. He was paid more than the employees in his crew, and he was recognized as a supervisor by those employees under him.

Joe Fernandez was empowered to set crew schedules for all three shifts, call in additional employees as needed, assign and require overtime, schedule vacations, and requisition needed equipment.

The Board has in the past found supervisory status in cases involving a far lesser degree of supervisory authority than that shown to exist here. For example, in *Ace Tool Engineering Co.*, 207 N.L.R.B. 104 (1973), an employee of a tool design company was declared a supervisor merely on

the basis of evidence that he periodically requested certain employees be assigned to him on a project. Very minor incidents of supervisory authority were also sufficient for the Board to confer supervisory status in the following cases: *Georgetown Development & Mgmt. Corp.*, 227 N.L.R.B. 381 (1976); *Murray Equipment Co.*, 226 N.L.R.B. 1092 (1976); *Golden Gateway Center*, 195 N.L.R.B. 492 (1972).

Each of these cases has one element in common: the employer was contending *against* the supervisory status of the employee involved. In *Ace Tool*, for example, the employer was found to have committed an unfair labor practice by virtue of certain statements made by the disputed supervisor. Thus, these cases suggest that the Board's judgment in these matters is guided less by objective weighing of the record evidence than by which side, management or union, is arguing for supervisory status. Obviously, the statute should be interpreted in the same way no matter who the contending parties are.

In sum, the Board's decision in this case, as approved by the Court of Appeals, is at variance with the great body of case law dealing with supervisory status. If this decision is allowed to stand, the inevitable result will be further confusion in the law on an issue of vital importance to labor-management relations in this country.

B. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER CIRCUITS AND WITH EARLIER DECISIONS OF THE FIFTH CIRCUIT

The court's decision below is in direct contradiction to the well-established rule that credibility determinations by the Board based on an inadequate reason or no reason at all are not entitled to deference by the reviewing court. *Custom Recovery Inc.* v. *NLRB*, 597 F.2d 1041 (5th Cir.

1979); *NLRB* v. *Highview, Inc.*, 590 F.2d 174 (5th Cir. 1979); *NLRB* v. *Moore Business Forms, Inc.*, 574 F.2d 835 (5th Cir. 1978); *NLRB* v. *Martin A. Gleason Inc.*, 534 F.2d 466 (2d Cir. 1976); *Altemose Construction Co.* v. *NLRB*, 514 F.2d 8 (3d Cir. 1975); *NLRB* v. *Elias Bros. Big Boy, Inc.*, 327 F.2d 421 (6th Cir. 1964).

For example, in *Custom Recovery Inc. v. NLRB*, 597 F.2d 1041 (5th Cir. 1979), a different panel of the Fifth Circuit rejected an Administrative Law Judge's discrediting of an employer witness based on the ALJ's perception that the witness had testified inconsistently. The court held that an examination of the record showed no inconsistency whatsoever and thus no basis existed for the credibility resolution.

Similarly, in *NLRB v. Highview, Inc.*, 590 F.2d 174 (5th Cir. 1979), the Fifth Circuit overturned a credibility resolution which was based on the ALJ's conclusion that certain documentary evidence (time cards) had been altered. The court determined on review that the time cards in fact were not altered and thus there was no rational basis for the credibility resolution.

Other circuits have also ruled that ALJ credibility choices need not be deferred to by reviewing courts where they are not based on justifiable reasons. For example, the Fourth Circuit rejected an ALJ's credibility resolution in *American Mfg. Associates v. NLRB*, 594 F.2d 30 (4th Cir. 1979). There the ALJ had refused to credit the employer's witness on grounds that the testimony was extremely unlikely as a matter of management policy. The court held this was "surmise and speculation" and ignored other testimony showing a logical basis for the action. *See also Altemose Construction Co. v. NLRB*, 514 F.2d 8 (3d Cir. 1975) (ALJ credibility resolution overturned for failure to consider several collateral factors bearing on credibil-

ity); *NLRB v. Elias Bros. Big Boy Inc.*, 327 F.2d 421 (6th Cir. 1964) (held unreasonable to credit uncorroborated and self-serving testimony of discriminatee who had been vague and evasive).

In the case at bar, the court accepted the Board's finding, based on a credibility resolution by the Hearing Officer, that Gregory Fuentes was not a supervisor. Fuentes had testified that he had no supervisory authority. On the other hand, Manuel Galindo, the Personnel Manager, had testified *inter alia* that Fuentes did have the supervisory authority to assign jobs to the men on his crew and to order laborers to assist the crew in their work. The Hearing Officer expressly credited Fuentes' testimony over that of Galindo on the grounds that Fuentes was more familiar with the day-to-day operation of the Village repair crew.

The Hearing Officer's purported justifiaction for discrediting Galindo's testimony is utterly inadequate. The record contains no evidence to support this sweeping assumption that Galindo lacked sufficient familiarity with Fuentes' job duties. In fact, the record clearly shows that Galindo was thoroughly familiar with Fuentes work. According to Fuentes' own testimony, Galindo very frequently witnessed his work performance and was therefore in an excellent position to know the extent of his duties and authority. In addition, Galindo's testimony was supported by the testimony of the Union's own witness, Amado Garcia, who indicated that Fuentes was considered the "Chief" and the other crew members (including himself) were "Indians." The Hearing Officer's rationale for discrediting Galindo's testimony therefore falls of its own weight. In such a case, deference to the Board's credibility findings is not warranted. In the words of a different panel of the Fifth Circuit:

> If, however, the credibility choice is based on an inadequate reason, or no reason at all, we are not compelled to respect it and *shall not do so.*

NLRB v. Moore Business Forms, Inc., 574 F.2d 835, (5th Cir. 1978) (emphasis added).

Similarly, the court below has improperly given deference to the Hearing Officer's credibility resolution concerning Joe Fernandez's supervisory status. In opposition to Fernandez's denial of supervisory authority, Galindo testified that Fernandez scheduled vacations for the members of his crew, left directions for the second shift, had the authority to authorize overtime, called employees from their homes when additional help was needed, and requisitioned equipment. This evidence of supervisory status was apparently rejected by the Hearing Officer, who gave no reason for doing so. As noted above, credibility determinations based on no apparent reason are not entitled to deference by a reviewing Court. *NLRB v. Moore Business Forms, Inc.*, 574 F.2d 835, 843 (5th Cir. 1978); *NLRB v. Martin A. Gleason, Inc.*, 534 F.2d 466 (2d Cir. 1976).

It is clear that the decision of the court below stands in direct contradiction to the holdings of other federal circuits and other panels of the Fifth Circuit regarding the appropriate deference to be accorded administrative credibility findings. Therefore this Court should grant this Petition in order to resolve these conflicting decisions in the federal circuits.

CONCLUSION

For these reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, A. Martin Wickliff, Jr., attorney for Petitioner San Antonio Portland Cement Company, do hereby certify that on this ____ day of June, 1980, 3 copies of the foregoing Petition were mailed to each of the following counsel of record for the parties in this proceeding:

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